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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOSE LUIS ALANIS et al., Plaintiffs and Appellants, v. JURUPA COMMUNITY SERVICES DISTRICT, Defendant and Respondent.	E047375 (Super.Ct.Nos. RIC452753 & RIC456409) OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed in part, reversed in part.

Law Office of Thomas W. Sardoni, Thomas W. Sardoni and Daniel L. Schnebly for Plaintiffs and Appellants.

Koeller, Nebeker, Carlson & Haluck, Gary L. Hoffman and Tracy L. Hughes for Defendant and Respondent.

Jose Luis Alanis and several of his neighbors (collectively, the Alanises) sued Jurupa Community Services District (JCSD),[1] and various other parties for negligence, trespass, nuisance, and intentional and negligent infliction of emotional distress. The trial court granted JCSD's motion for a judgment on the pleadings. (Code Civ. Proc., § 438, subd. (b).) The Alanises contend that the trial court erred by granting the judgment on the pleadings because the trial court incorrectly concluded that JCSD was immune from liability. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL HISTORY

We present the facts and then present the procedural history. The following facts are taken from the Alanises' complaint.[2]

A. Facts

On or about July 1, 2005, Mr. and Mrs. Stits (the Stitses) commenced plans to develop an area of real property referred to as the "Manor Drive" properties. On or about July 1, 2005, the Stits hired MP Engineering to rough-grade the Manor Drive

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[1] Community service districts provide public facilities and services; can "serve as an alternative to the incorporation of a new city" (Gov. Code, § 61001, subd. (b)(3)); and/or act as "[a] transitional form of governance as [a] community approaches cityhood" (Gov. Code, § 61001, subd. (b)(4)). Specifically, community service districts may provide water, sewage service, fire protection, recreation facilities, street lights, disease control, police protection, library services, roads, emergency medical services, public airports, transportation services, flood protection facilities, as well as a variety of other services and infrastructure. (Gov. Code, § 61100.)

[2] We take the facts from the complaint, because "[o]n appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend, we must treat every material, issuable fact properly pleaded as true [citation] and shall treat pleaded facts as if they were established facts." (*Buford v. California* (1980) 104 Cal.App.3d 811, 815.)

properties. The Riverside County Planning Department issued a permit for the rough-grading. JCSD was notified of the planned grading activities; however, JCSD did not properly locate and mark its 12-inch water main on the Manor Drive properties.

On September 20, 2005, MP Engineering and others (collectively, the excavators) were rough-grading the Manor Drive properties, when the excavators struck and ruptured JCSD's 12-inch water main. Water flowed from the broken water main for approximately one hour. Thousands of gallons of water flowed downhill from the water main to the Alanises' residences, and flooded the residences.

After the flooding, JCSD entered the Alansises' residences and removed the interior walls, drywall, wall coverings, plumbing fixtures, electrical outlets, electrical wiring, and kitchen appliances. No attempt was made to repair the damage caused by the flooding or the damage caused by removing the walls and fixtures. Accordingly, electrical wiring, plumbing, and insulation remained exposed in the Alanises' residences.

On December 28, 2005, the excavators conducted additional grading at the Manor Drive properties. On that date, a water truck operated by the excavators tipped on its side and released approximately 2,000 gallons of water, which flowed downhill and flooded the Alanises' residences a second time. The second flood caused additional damage to the Alanises' residences.

B. Procedural History

The Alanises filed individual government tort claims with JCSD on March 16, 2006. The Alanises did not receive a response from JCSD, and therefore, assumed that their claims were rejected.

The following procedural history is taken from the record on the appeal, i.e., the history is not limited to the complaint.

On October 5, 2006, the Alanises filed their first amended complaint against JCSD. JCSD demurred to the complaint on February 14, 2007. JCSD claimed that its demurrer should be granted because (1) the complaint failed to state facts sufficient to constitute a cause of action; (2) JCSD was immune from common law negligence claims, because it was a governmental entity; and (3) the facts in the Alanises' complaint did not substantially correspond with the facts in the Alanises' government tort claims.

On March 22, 2007, Judge Webster held a hearing on JCSD's demurrer. Judge Webster overruled the demurrer and gave JCSD 30 days to answer the Alanises' complaint. On June 5, 2007, the Alanises' neighbors, the Mendozas, moved to consolidate their case against JCSD with the Alanises' case, based upon common issues of law and fact, and the motion was granted.[3] Approximately two months later, JCSD moved to have a judge, other than Judge Webster, assigned to the case. (Code Civ.

[3] Jose Luis Alanis filed the instant case along with several of his neighbors; however, the Mendozas were not among the neighbors that joined in Jose Luis Alanis's suit. This court has addressed the Mendozas' case in a separate opinion (case No. E046336).

Proc., § 170.6.) The trial court granted JCSD's request to transfer the case to an alternative department.

On May 15, 2008, the trial court granted JCSD's demurrer to the Mendozas' third amended complaint, without leave to amend. The court found that Government Code[4] sections 4216 et seq. and 815.6, Public Utilities Code section 2106, and Evidence Code section 699 were inapplicable and insufficient to impose liability upon JCSD. The Mendozas' theories of liability were based upon the foregoing statutes, and therefore, the trial court dismissed the Mendozas' complaint, as to JCSD, with prejudice.

On August 6, 2008, JCSD filed a motion for a judgment on the pleadings as to the Alanises' first amended complaint.[5] JCSD argued that its motion should be granted given the trial court's finding in the Mendozas' case that JCSD did not owe a mandatory duty of care to the Mendozas. A hearing on the motion was held on October 9, 2008, before Judge Tranbarger. Judge Tranbarger's indicated ruling was to grant the motion for judgment on the pleadings; however, the trial court stated that the reason for granting the motion was not because of a collateral estoppel effect from the ruling in the Mendozas' case. Rather, the trial court said that it would consider JCSD's motion "anew." Nevertheless, when the trial court delivered its indicated ruling, it made the following comment: "Indicated is to grant the motion for the same reason stated when I

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[4] All further statutory references are to the Government Code unless otherwise indicated.

[5] JCSD's motion reflects that it was filed in response to the Alanises' "second amended complaint." We infer that this was an error, because the record does not include a second amended complaint from the Alanises, and the court's ruling on the motion refers to the complaint as the "first amended complaint."

had the case with the other defendant—the other plaintiff." The parties submitted on the indicated ruling, and the court responded, "Motion for judgment on the pleadings is granted."

DISCUSSION

The Alanises contend that the trial court erred by granting JCSD's motion for judgment on the pleadings, because JCSD is not immune from tort liability. The Alanises assert that JCSD is liable pursuant to Government Code sections 815.6, 4216 et seq., and Public Utilities Code section 2106. We disagree.

"A motion for judgment on the pleadings serves the function of a demurrer, challenging only defects on the face of the complaint. [Citation.] On review, we render our independent judgment on the question whether the complaint states a cause of action. [Citation.] . . . 'In view of the fact that tort causes of action against public entities are now based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable. Every fact essential to the existence of statutory liability must be pleaded.' [Citation.]" (*Richardson-Tunnell v. School Ins. Program for Employees* (*SIPE*) (2007) 157 Cal.App.4th 1056, 1061.)

We begin our analysis by examining Government Code sections 815.6 and 4216 et seq., and then turn to Public Utilities Code section 2106.

A. Sections 815.6 and 4216 et seq.

1. *Complaint*

In their first amended complaint, the Alanises cited sections 4216.2 and 4216.3 to support their allegation that JCSD had a duty to mark the water main on the Manor Drive properties prior to the commencement of the rough-grading.

We are unable to locate a citation to section 815.6 in the Alanises' first amended complaint. Nevertheless, we will address the Alanises' contention related to the code section because the trial court granted the motion for judgment on the pleadings in the instant case for the same reasons that it granted the demurrer in the Mendozas' case, which included the finding that sections 815.6 and 4216 et seq. were inapplicable and insufficient to impose liability upon JCSD.

2. *Statutory Language*

Section 815.6, concerning the liability of public entities, provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

3. *Analysis*

The Alanises contend that section 815.6 provides a basis to hold JCSD liable for failing to fulfill its mandatory duty to mark the water main. (§§ 4216.2, 4216.3.) The Alanises assert that the trial court erred by concluding that section 815.6 did not provide sufficient support for imposing liability upon JCSD. We disagree.

"Under the Government Claims Act [citation], there is no common law tort liability for public entities in California; instead, such liability must be based on statute. [Citations.] One such statute is . . . section 815.6 . . . ." (*Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897 (*Guzman*).) "The elements of liability under . . . section 815.6 are as follows: 'First and foremost, application of section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. [Citation.]' [Citation.] Courts have construed this first prong rather strictly, finding a mandatory duty only if the enactment 'affirmatively imposes the duty and provides implementing guidelines.' [Citations.]" (*Id*. at p. 898.)

"'Second, but equally important, section 815.6 requires that the mandatory duty be "designed" to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is "'one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.'" [Citation.] Our inquiry in this regard goes to the legislative *purpose* of imposing the duty. That the enactment "confers some benefit" on the class to which [the] plaintiff belongs is not enough; if the benefit is "incidental" to the enactment's protective purpose, [then] the enactment cannot serve as a predicate for liability under section 815.6. [Citation.]' [Citations.]" (*Guzman*, *supra*, 46 Cal.4th at p. 898.)

Section 4216.3, subdivision (a), requires that a utility operator, within two working days of receiving notification of an excavator's intent to dig, "locate and field mark the approximate location and, if known, the number of subsurface installations that may be affected by the excavation to the extent and degree of accuracy that the information is available," or the operator must advise the excavator that it does not operate any subsurface installations that would be affected by the proposed excavation. Additionally, operators must make a reasonable effort to mark water installations with the color "Safety Precaution Blue." (§ 4216.3, subd. (b)(4).)

The language of section 4216.3, subdivision (a), is obligatory, not discretionary or permissive, because it requires that utility operators field mark their subsurface installations—utility companies are not given the option of not marking their subsurface installations upon receiving notice of an intent to dig. Further, section 4216.3 provides guidelines for implementing the directive: (1) the field marking must be completed within two working days of the utility company receiving notification of an intent to dig (§ 4216.3, subd. (a)(1)); and (2) the field markings for water installations should be in "Safety Precaution Blue." (§ 4216.3, subd. (b)(4).) Based upon the foregoing examination of the statutory language, we conclude that the first prong of the analysis is satisfied, i.e., section 4216.3 creates a mandatory duty, because (1) the duty is obligatory, and (2) the statute provides directions for carrying out the duty.

Next, we must determine if the mandatory duty was designed to protect against the particular type of injuries suffered by the Alanises. Section 4216 was added to the Government Code in 1983, at the same time that section 4215.5 was repealed. (Stats.

1982, ch. 1507, § 2, pp. 5849-5851.) Section 4215.5 and 4216 both relate to subsurface installations.[6] (Stats. 1982, ch. 1507, §§ 1-3, pp. 5849-5851.) Section 4215.5 was set to expire on July 1, 1983, and sections 4216 and 4217 essentially set forth a more detailed set of laws concerning excavations near subsurface installations, following the expiration of section 4215.5. Accordingly, although the Legislature did not provide the purpose for enacting or amending section 4216 et seq., we look to the Legislature's explicit purpose for enacting section 4215.5, because the sections are so closely related. Section 4215.5 was enacted "for the purpose of protecting [subsurface] installations from damage, removal, relocation, or repair." In particular, section 4215.5 created the "regional notification center," which is the organization that excavators contact when they plan to excavate and who, in turn, contacts the local utilities to inform them of planned excavation, so that the utilities can mark their subsurface installations. (Stats. 1982, ch. 1507, § 1, pp. 5850.)

The Legislature's intent of protecting subsurface installations by creating the "regional notification center" is reflected in the version of section 4216 et seq., which was in effect at the time the Alanises' residences were damaged in 2005: Section 4216.1 requires that every operator of a subsurface installation "become a member of, participate in, and share in the costs of, a regional notification center." Consequently,

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[6] Section 4215.5 read, in part: "The legislative body of a city, city and county, or county may by ordinance require public utility companies owning or operating subsurface installations and all other owners or operators of subsurface installations within public streets, to become members, participate in the activities, and share in the costs of a regional notification center providing advance warning of excavations or other work close to existing installations, for the purpose of protecting such installations from damage, removal, relocation, or repair." (Stats. 1982, ch. 1507, § 1, pp. 5850.)

we conclude that the purpose of section 4216 et seq. is to protect underground infrastructure from damage. An incidental benefit of protecting underground infrastructure is that residential buildings will not be harmed by sewage spills, gas leaks, or electrical disruptions. In other words, the mandatory duty in section 4216.3 was not designed to protect against the particular type of injuries suffered by the Alanises.[7] Consequently, we conclude that the Alanises' claims for damages do not go to the legislative purpose of section 4216.3. In sum, the Alanises failed to satisfy the second prong of the analysis; and therefore, the trial court did not err by granting the judgment on the pleadings.

The Alanises contend that "it would be ludicrous to conclude that utility companies and workers were the only parties the Legislature meant to protect by creating this elaborate notification scheme, when it logically confers such a substantial benefit to the general public, especially to the parties likely to be injured in the event [that a] subsurface utility ruptures."

The Alanises offer only the foregoing conclusions; they do not cite to legal authority or discuss legislative history. Based upon our review of the relevant statutes

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[7] We note that on August 27, 2006, Senator Tom Torlakson wrote a letter to the Secretary of the Senate explaining that he introduced amendments to Government Code section 4216, i.e. Senate Bill 1359, "to protect workers as well as the underground [installations] themselves." The workers that Senator Torlakson was referring to are the people who do excavation work. (Sen. Daily Journal (2005-2006 Reg. Sess.) pp. 5608-5609.) We do not discuss this letter when analyzing the purpose of section 4216, because the damage to the Alanises' property occurred on September 20, 2005—approximately 11 months before the letter was written. Nevertheless, we acknowledge that the purpose of section 4216 may have changed as a result of statutory amendments that were enacted after the flooding of the Alanises' property.

and their histories, discussed *ante*, we are not convinced that the Alanises' conclusions are correct.

B. Public Utilities Code Section 2106

1. *Complaint*

We are unable to locate a citation to Public Utilities Code section 2106 in the Alanises' first amended complaint.

2. *Statutory Language*

Public Utilities Code section 2106 provides: "Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. . . . An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person."

3. *Analysis*

The Alanises contend that Public Utilities Code section 2106 provides grounds for imposing liability upon JCSD. Because we are unable to locate a citation to Public Utilities Code section 2106 in the Alanises' first amended complaint, we infer that the Alanises are asserting the following argument: To the extent the trial court properly granted the judgment on the pleadings, the Alanises should be permitted to amend their

complaint to allege that JCSD is liable pursuant to Public Utilities Code section 2106, because the code section provides alternate grounds for liability. We disagree.

"Public Utilities Code section 2106 was enacted to supplement the public remedies enumerated elsewhere in chapter 11 of the Public Utilities Act (Pub. Util. Code, § 2100 et seq.) 'by authorizing the traditional private remedy of an action for damages brought by the injured party in superior or municipal court . . . .' [Citation.] The statute simply allows claims to be brought against utilities . . . by private individuals. [Citations.]" (*Jackson v. Pacific Gas & Elec. Co.* (2001) 94 Cal.App.4th 1110, 1120.)

Public Utilities Code section 2106 does not lend itself to a cause of action against JCSD because our state constitution defines the term "public utilit[y]" as "[p]rivate corporations and persons that own, operate, control, or manage a line, . . . or system for . . . water . . . directly or indirectly to or for the public." (Cal. Const., art. XII, § 3.) JCSD is not a private corporation or a person, rather, it is a community services district. (Gov. Code, § 61100.) Accordingly, JCSD does not fall within the definition of "public utility." Therefore, Public Utilities Code section 2106 is not applicable to JCSD.

The Alanises offer the following argument: Public Utilities Code section 2106 "expressly provides a private right of action allowing [the Alanises] to recover their damages from JCSD." The Alanises do not cite to legal authority or otherwise explain the foregoing legal conclusion. Accordingly, we are not persuaded that the Alanises' conclusion is correct.

C. Limitation of Our Holding

Our opinion in this matter is not meant to foreclose people bringing lawsuits against community service districts. Section 61119 and former section 61628 provide that all claims for money damages against community services districts are governed by section 900 et seq., and section 940 et seq. Specifically, section 905 is the primary authority for "all claims for money or damages against local public entities." Section 945 provides that "[a] public entity may sue and be sued"; and a "local public entity" is defined as "a county, city, *district*, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State." (§ 940.4, italics added.) In sum, it is not our opinion that community services districts are immune from civil lawsuits, rather, we have concluded that the particular code sections discussed in this opinion do not remove any of the governmental immunities that JCSD may possess; nor do the cited code sections impose a mandatory duty on JCSD.

D. Collateral Estoppel

The Alanises contend that the trial court granted the judgment on the pleadings based upon an incorrect interpretation of the statutes discussed in this opinion, and not based upon principles of collateral estoppel. We have addressed the merits of the Alanises' appellate contentions. Consequently, we do not need to address the possibility that the trial court's ruling relied on principles of collateral estoppel.

E. Leave to Amend

The Alanises do not specifically discuss the issue of amending their complaint in their opening brief; however, they do request reversal of the trial court's entire order. At oral argument, the Alanises cited *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920 (*Nestle*), for the proposition that they could amend their complaint to allege a nuisance cause of action against JCSD. Therefore, we now determine whether the trial court abused its discretion by denying the Alanises leave to amend their complaint. (Code Civ. Proc., § 472c, subd. (a).) We conclude that the court did abuse its discretion.

"If we find that an amendment could cure the defect, [then] we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The Alanises bear the burden of proving that an amendment would cure the defect in the complaint. (*Ibid.*)

In *Nestle*, our Supreme Court considered whether Government Code section 815 precluded government liability for nuisance. (*Nestle*, *supra*, 6 Cal.3d at p. 931.) Our high court concluded that Government Code section 815, "does not bar nuisance actions against public entities to the extent such actions are founded on section 3479 of the Civil Code or other statutory provision that may be applicable." (*Nestle*, at p. 937.) In other words, our high court construed Civil Code section 3479 as providing an adequate statutory basis for governmental liability. (See *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1349 [similar interpretation of *Nestle*]; see also *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 159, fn. 2 [same].)

Civil Code section 3479 provides: "Anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

"It has long been the law in California that '"[n]ot only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation are responsible for the ensuing damages."' [Citation.] Thus, courts have upheld as against a demurrer a nuisance claim founded upon allegations that . . . defendant soils engineer prepared a plan for slope repair on a neighboring property which, when constructed, caused water, mud, and debris to flow onto the plaintiff's property [citation]. Similarly, a nonsuit on [a] plaintiff's cause of action for nuisance was reversed where the evidence showed defendant contractor dumped fill on a street, interfering with drainage and causing the plaintiff's property to be flooded. [Citation.]" (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38.) "In sum, liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance. [Citation.]" (*Ibid.*)

Based upon the foregoing rules, we conclude that the Alanises could amend their complaint to properly bring a cause of action for nuisance. The Alanises' first amended complaint already includes a cause of action for nuisance, and refers to Civil Code

section 3479. We choose not to explain our analysis in great detail, because (1) we do not wish to draft the nuisance cause of action for the Alanises; and (2) we do not want to bind the trial court in regard to a future demurrer that may be raised if the Alanises amend their complaint. In sum, we conclude that the trial court abused its discretion because, based upon the cases and statutes cited *ante*, it appears that an amendment could cure the defects in the Alanises' complaint. Therefore, we reverse the trial court's order denying the Alanises leave to amend their complaint.

DISPOSITION

The order, or portion of the order, which granted the demurrer is affirmed. The order, or portion of the order, which denied leave to amend is reversed. The parties are to pay their own costs on appeal.

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/s/ MILLER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ GAUT
J.